Public Prosecutor v Ishak bin Hj Shaari

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-09–17 OF 2005
LOW HOP BING, MOHD HISHAMUDIN AND ZAHARAH IBRAHIM JJCA
26 NOVEMBER 2010

Civil Procedure — Jurisdiction of court — Court of Appeal — Whether Court of Appeal may review its prior decisions — Whether Court of Appeal has inherent jurisdiction to review earlier decisions — Courts of Judicature Act 1964 s 50 — Federal Constitution art 121(1B)

The sessions court had convicted the respondent on the offence of rape of a minor under s 376 of the Penal Code and had sentenced him to 15 years' imprisonment and five strokes of whipping. The High Court allowed his appeal and set aside the conviction and sentence. The Court of Appeal however allowed the public prosecutor's appeal and set aside the order of the High Court, and restored the conviction and sentence recorded by the sessions court. The respondent therefore now applied to this court to exercise it powers of review to review the earlier decision of the Court of Appeal ('the decision'). The respondent's counsel contended that the decision had failed to give due consideration to certain evidence, and hence a miscarriage of justice had been occasioned. The prosecution on the other hand raised a preliminary objection that the Court of Appeal has no jurisdiction or power to review its own previous decision.

Held, allowing the preliminary objection:

(1) (per **Low Hop Bing JCA**) The notice of motion and supporting affidavit revolved around relitigation of issues already concluded in the prior proceedings in the Court of Appeal. The accused was moving the Court of Appeal to invoke inherent powers to exercise criminal appellate jurisdiction which the Court of Appeal had already exercised in the prior proceedings. The notice of motion was legally unsustainable as the Court of Appeal does not have the jurisdiction to hear and determine an appeal against the decision of the same court, in view of art 121(1B) of the Federal Constitution ('art 121(1B)') read with s 50(1) of the CJA ('s 50(1)') (see para 10).

(2) (per **Low Hop Bing JCA**) The jurisdiction of the Court of Appeal is to be determined by reference to art 121(1B), s 50(1) and O 92 r 4 of the Rules of the High Court 1980. While r 137 of the Rules of the Federal Court 1995 and O 92 r 4 are somewhat similar, they are not identical. Rule 4 of

the Rules of the Court of Appeal 1994 has transplanted or supplanted O 92 r 4 into the 1994 Rules. The obvious difference between r 137 and O 92 r 4 is that the words 'to hear any application or' which appear in r 137 are not to be found in O 92 r 4. Such exclusion means that O 92 r 4 is not intended to empower the Court of Appeal to hear the type of application which the Federal Court has jurisdiction to hear under r 137 and to invoke the 'review jurisdiction'. Order 92 r 4 does not provide for the hearing of such an application to set aside an earlier order of the Court of Appeal (see paras 34–37).

(3) (per **Low Hop Bing JCA**) The absence of the word 'review' in art 121(1B), s 50(1) and O 92 r 4 means that no review jurisdiction has ever been conferred upon the Court of Appeal when it was created in 1994. The conferment of 'review jurisdiction' is not by way of inherent powers. 'Review jurisdiction' must be expressly provided by statute (see paras 38 & 41).

(4) (per **Zaharah Ibrahim JCA**) The Courts of Judicature Act 1964 ('the CJA') sets out in detail the limits of the jurisdiction conferred on the Court of Appeal. Nothing in s 50 or any other provisions of the CJA or any other law confers upon the Court of Appeal the jurisdiction to review any matter which it has heard and finally determined, except in the circumstances set out in ss 42 and 44 of the CJA. Since the CJA only provides for those two instances where the court may revisit its earlier decision, it is not the intention of the Legislature that the court should be allowed to reopen or revisit its earlier decisions in any other case (see paras 58–59 & 63); *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 referred.

(5) (per **Zaharah Ibrahim JCA**) The High Court and the Federal Court could draw upon their historical jurisdiction as a basis for claiming the existence of an 'inherent'or a 'residual' jurisdiction. That same argument cannot possibly apply to the Court of Appeal which was only created in 1994 (see para 72).

(6) (per **Zaharah Ibrahim JCA**) Two recent decisions of the Federal Court show that the Federal Court no longer subscribes to the view that it has jurisdiction to review its earlier decisions. Hence, the decision of Mohd Ghazali Mohd Yusoff FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 is no longer a 'minority' view (see paras 91 & 93).

(7) (per **Zaharah Ibrahim JCA**) The reopening, rehearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, the Court of Appeal has no such jurisdiction (see para 94).

(8) (per **Mohd Hishamudin JCA, dissenting**) There are two previous judgments of the Court of Appeal that ruled that the Court of Appeal has the inherent power to review its own previous decision under exceptional circumstances in order to prevent an injustice being occasioned or to prevent an abuse of the process of the court, particularly where the previous decision was made by the Court of Appeal sitting as a court of last resort (see para 105); *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 and *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192 distinguished.

(9) (per **Mohd Hishamudin JCA, dissenting**) The Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort. The source of these inherent powers is neither r 137 of the Rules of the Federal Court 1995 nor r 4 of the Rules of the Court of Appeal read with O 92 r 4 of the Rules of the High Court 1980. The source of the inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art 121. These inherent powers are powers that the courts must have in order to dispense justice effectively and the limits of these inherent powers are difficult to define (see para 128); *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 referred.

[Bahasa Malaysia summary

Mahkamah sesyen telah mensabitkan responden atas kesalahan merogol budak bawah umur di bawah s 376 Kanun Keseksaan dan telah menjatuhkan hukuman penjara 15 tahun dan lima sebatan rotan. Mahkamah Tinggi telah membenarkan rayuannya dan mengetepikan sabitan dan hukuman. Mahkamah Rayuan bagaimanapun telah membenarkan rayuan pendakwaraya dan mengetepikan perintah Mahkamah Tinggi, dan mengekalkan sabitan dan hukuman yang direkodkan oleh mahkamah sesyen. Oleh itu responden memohon ke mahkamah ini untuk menggunakan kuasa semakannya untuk menyemak semula keputusan terdahulu Mahkamah Rayuan ('keputusan tersebut'). Peguam responden menegaskan bahawa keputusan tersebut telah gagal memberikan pertimbangan yang wajar tentang keterangan tertentu, dan justeru itu telah berlaku kegagalan melaksanakan keadilan. Pihak pendakwaan sebaliknya telah menimbulkan bantahan awal bahawa Mahkamah Rayuan tiada bidang kuasa atau kuasa untuk menyemak semula keputusan sebelumnya.

Diputuskan, membenarkan bantahan awal:

(1) (oleh **Low Hop Bing HMR**) Notis usul dan afidavit sokongan

berkisarkan litigasi semula isu-isu yang telahpun disimpulkan dalam prosiding terdahulu dalam Mahkamah Rayuan. Tertuduh memohon Mahkamah Rayuan menggunakan kuasa sedia ada untuk menggunakan bidang kuasa rayuan jenayah yang mana telahpun digunakan oleh Mahkamah Rayuan dalam prosiding terdahulu. Notis usul itu tidak boleh dikekalkan dengan sah kerana Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar dan menentukan rayuan terhadap keputusan mahkamah sama, menurut perkara 121(1B) Perlembagaan Persekutuan ('perkara 121(1B)') dibaca dengan s 50(1) AMK ('s 50(1)') (lihat perenggan 10).

(2) (oleh **Low Hop Bing HMR**) Bidang kuasa Mahkamah Rayuan hendaklah ditentukan dengan merujuk kepada perkara 121(1B), s 50(1) dan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980. Meskipun k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 dan A 92 k 4 dilihat sama tetapi tidaklah begitu. Kaedah 4 Kaedah-Kaedah Mahkamah Rayuan 1994 telah memindah atau mengambil A 92 k 4 ke dalam Kaedah 1994. Perbezaan nyata antara k 137 dan A 92 k 4 adalah perkataan-perkataan 'to hear any application or' yang dinyatakan dalam k 137 tidak dinyatakan dalam A 92 k 4. Pengecualian sebegini bermaksud bahawa A 92 k 4 tidak diniatkan untuk memberi kuasa kepada Mahkamah Rayuan mendengar jenis permohonan yang mana Mahkamah Persekutuan mempunyai bidang kuasa untuk mendengar di bawah k 137 dan untuk menggunakan 'review jurisdiction'. Aturan 92 k 4 tidak memberi peruntukan untuk mendengar permohonan untuk mengetepikan perintah terdahulu Mahkamah Rayuan (lihat perenggan 34–37).

(3) (oleh **Low Hop Bing HMR**) Ketiadaan perkataan 'review' dalam perkara 121(1B), s 50(1) dan A 92 k 4 bermaksud bahawa tiada bidang kuasa pernah diberikan kepada Mahkamah Rayuan apabila ia ditubuhkan pada tahun 1994. Pemberian 'review jurisdiction' bukan melalui kuasa-kuasa sedia ada. 'Review jurisdiction' hendaklah dengan jelas diperuntukkan oleh statut (lihat perenggan 38 & 41).

(4) (oleh **Zaharah Ibrahim HMR**) Akta Mahkamah Kehakiman 1964 ('AMK') menyatakan dengan terperinci had bidang kuasa yang diberikan kepada Mahkamah Rayuan. Dalam s 50 atau mana-mana peruntukan AMK atau mana-mana undang-undang lain memberikan Mahkamah Rayuan bidang kuasa menyemak semula apa-apa perkara yang telah didengar dan diberikan keputusan muktamad olehnya, kecuali dalam keadaan yang dinyatakan dalam ss 42 dan 44 AMK. Oleh kerana AMK hanya memperuntukkan dua keadaan berikut di mana mahkamah boleh merujuk semula keputusan sebelumnya, ia bukan niat badan perundangan agar mahkamah kuasa patut dibenarkan membuka semula atau merujuk semula keputusan sebelumnya dalam mana-mana kes lain

(lihat perenggan 58-59 & 63); *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 dirujuk.

(5) (oleh **Zaharah Ibrahim HMR**) Mahkamah Tinggi dan Mahkamah Persekutuan boleh mendapat bidang kuasa menurut sejarah sebagai asas menyatakan mempunyai bidang kuasa 'inherent' atau bidang 'residual'. Hujah yang sama tidak mungkin boleh terpakai ke atas Mahkamah Rayuan yang hanya terbentuk pada tahun 1994 (lihat perenggan 58–59 & 63).

(6) (oleh **Zaharah Ibrahim HMR**) Dua keputusan terkini Mahkamah Persekutuan menunjukkan bahawa Mahkamah Persekutuan tidak lagi menggunapakai pendapat bahawa ia mempunyai bidang kuasa untuk mengkaji semula keputusan terdahulunya. Justeru itu, keputusan Mohd Ghazali Mohd Yusoff HMP dalam kes *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 bukan lagi pendapat 'minority' (lihat perenggan 72).

(7) (oleh **Zaharah Ibrahim HMR**) Pembukaan semula, pendengaran semula, pemeriksaan semula atau kajian semula suatu perkara yang telahpun diputuskan oleh mahkamah bukan sahaja isu prosedur tetapi suatu yang substantif. Oleh demikian ia suatu perkara tentang bidang kuasa. Kecuali dan sehingga bidang kuasa itu diberikan oleh undang-undang, Mahkamah Rayuan tidak ada bidang kuasa sedemikian (lihat perenggan 91 & 93).

(8) (oleh **Mohd Hishamudin HMR, menentang**) Terdapat dua penghakiman terdahulu Mahkamah Rayuan yang memutuskan bahawa Mahkamah Rayuan mempunyai kuasa sedia ada untuk mengkaji semula keputusan terdahulunya dalam keadaan yang dikecualikan bagi tujuan mengelak berlaku ketidakadilan atau menghalang penyalahgunaan proses mahkamah, terutamanya di mana keputusan terdahulu dibuat oleh Mahkamah Rayuan yang bersidang sebagai mahkamah terakhir (lihat perenggan 94); *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 and *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192 dibeza.

(9) (oleh **Mohd Hishamudin HMR, menentang**) Mahkamah Persekutuan dan Mahkamah Rayuan mempunyai bidang kuasa sedia ada atau kuasa menyemak semula keputusan terdahulunya dalam keadaan terkecuali di mana mahkamah berpuas hati bahawa adalah perlu untuk berbuat demikian bagi tujuan mengelak ketidakadilan berlaku disebabkan keputusan terdahulu atau mengelakkan penyalahgunaan proses mahkamah, terutamanya apabila keputusan terdahulu dibuat oleh Mahkamah Rayuan yang bersidang sebagai mahkamah terakhir. Sumber kuasa-kuasa sedia ada ini bukan pada k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 mahupun k 4 Kaedah-Kaedah Mahkamah Rayuan

dibaca dengan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980. Sumber kuasa-kuasa sedia ada tersebut adalah kuasa kehakiman yang diberikan oleh badan kehakiman oleh Perlembagaan Persekutuan, khususnya perkara 121. Kuasa-kuasa sedia ada tersebut adalah kuasa-kuasa yang mahkamah patut ada bagi tujuan melaksanakan keadilan dengan berkesan dan batas kuasa-kuasa sedia ada tersebut sukar ditafsirkan (lihat perenggan 105); *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 dirujuk.]

Notes

For cases on jurisdiction of court generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5133–5141.

Cases referred to

Abdul Razak bin Dalek v PP [2010] 4 MLJ 725, FC (refd)
Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417, FC (refd)
Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application [2005] 3 MLJ 1; [2004] 4 CLJ 350; [2004] 5 AMR 709, FC (refd)
Anantharaju Shetty v Appu Hegade AIR 1919 Madras 244 (refd)
Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] MLJU 251; [2008] 6 CLJ 1, FC (refd)
Azlan bin Alias v PP [2009] 4 MLJ 493, CA (refd)
Badan Peguam Negara v Kerajaan Malaysia [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)
Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn [1981] AC 909; [1981] 1 All ER 289, HL (refd)
Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101, FC (refd)
Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1, FC (refd)
Chu Tak Fai v PP [2007] 1 MLJ 201, FC (refd)
Connelly v Director of Public Prosecutions [1964] AC 1254; [1964] 2 All ER 401, HL (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158; [2010] 7 CLJ 397; [2010] 5 AMR 677, FC (refd)
Drew and another v Willis, ex parte Willis [1891] 1 QB 450, CA (refd)
Harbhajan Singh v Karam Singh AIR 1966 SC 641, SC (refd)
Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd [1999] 1 MLJ 366; [1999] 1 CLJ 337, CA (refd)
Lee Lee Cheng (f) v Seow Peng Kwang [1960] MLJ 1, CA (refd)
Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors [1986] 1 MLJ 166, SC (refd)
MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673, FC (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

PM Hendry v George John de Cruz [1949] MLJ 79 (refd)
PP v Abdullah bin Idris [2009] 5 MLJ 192; [2009] 5 CLJ 445, CA (distd)
Raja Prithwi Chand Lal Choudhury v Sukraj Rai and others AIR 1941 FC 1 (refd)
Ramanathan a/l Chelliah v PP [2009] 6 MLJ 215, CA (distd)
Regina v Gould [1968] 2 QB 65, CA (refd)
SJS Fernandes v V Ranganayakulu Chetty AIR 1953 Mad 236 (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753; [2008] 5 CLJ 201; [2008] 4 AMR 583 (refd)
Taylor and another v Lawrence and another [2002] 2 All ER 353, CA (distd)
Trilok Singh Dutta and Ors v State Transport Authority, Bihar AIR 1985 Pat 87 (refd)
Uddin (a child) (serious injury: standard of proof), Re [2005] 3 All ER 550, CA (distd)
Venkata Narasimha Appa Row v The Court of Wards and others (1886) 11 App Cas 660 (refd)
Wicks v Wicks [1998] 1 All ER 977, CA (refd)
Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293, HL (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)(a)
Courts of Judicature Act 1964 ss 16, 17, 42, 42(2), (3), 44, 50, 50(1), 87, 96, Part IV
Federal Constitution arts 121 121(1), (1B), (2), 162(2), 172
Interpretation Acts 1948 and 1967 s 3
Penal Code ss 354, 376
Rules of the Court of Appeal 1994 r 4
Rules of the High Court 1980 O 53, O 92 r 4
Rules of the Federal Court 1995 r 137

Appeal from: Criminal Appeal No 42–07 of 2000 (High Court, Seremban)

Karpal Singh (Lim Chi Chau with him) (Karpal Singh & Co) for the appellant.
Awang Armadajaya (Murtazadi bin Amran with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA:

IMPORTANT QUESTION OF LAW

[1] This application by way of notice of motion was filed by the applicant ('the accused'). We heard the application on 5 October 2010. Judgment was reserved. We now deliver our separate judgments.

[2] This application raises a question of law of general public importance. It concerns the reopening of a final appeal which had already been heard and determined by the Court of Appeal as the apex court. The question may be formulated as follows:

> Does the Court of Appeal (as the apex court for the disposal of an appeal originating from a sessions court) have the inherent powers to reopen and set aside an earlier order of the same court, made in the same case in exercise of its appellate jurisdiction, after disposing of the appeal as a final appeal?

NOTICE OF MOTION

[3] The notice of motion and supporting affidavit contain a narrative of the proceedings prior to this application.

[4] The notice of motion, expressed in the national language, seeks an order which reads:

> untuk suatu perintah agar mahkamah Yang Mulia ini menggunakan kuasa-kuasa (*inherent power*) sedia ada dan mengenepikan perintah Mahkamah Rayuan dalam Rayuan Jenayah N-09–17–2005 yang membenarkan rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi Seremban Rayuan Jenayah No. 42–7–2000 dimana keputusan Mahkamah Sesyen Seremban adalah disahkan oleh Mahkamah Rayuan dan dimana responden dikenakan hukuman penjara selama 15 tahun bermula dari tarikh 13 Oktober 2008 dan 5 kali sebatan rotan, ataupun apa jua perintah yang lain yang difikirkan patut dan adil oleh Mahkamah Yang Mulia ini.
>
> (My Translation
>
> for an order that this Honourable Court invoke its inherent powers and set aside the order of the Court of Appeal in Criminal Appeal N-09–17–2005 which allowed the Public Prosecutor's appeal against the decision of the Seremban High Court in Criminal Appeal No. 42–7–2000, wherein the decision of the Sessions Court Seremban was affirmed by the Court of Appeal and the respondent was sentenced to 15 years imprisonment with effect from 13 October 2008 and 5 strokes of the rotan, or such other order as this Honourable Court deems proper and just.)

[5] The supporting affidavit was affirmed by the accused's lawyer. Paragraphs 5–9 of the affidavit are relevant. They are reproduced below:

> 5. Sesalinan rekod rayuan dan petisyen rayuan dieksibitkan di sini dan ditanda secara kolektif sebagai 'KS1'.
>
> 6. Saya dengan segala hormatnya menyatakan disini bahawa rujukan sepenuhnya akan dibuat kepada rekod rayuan serta petisyen rayuan yang difailkan oleh perayu pada tarikh pendengaran permohonan ini.

7. Saya dengan segala hormatnya menyatakan disini bahawa pada pendengaran rayuan ini di Mahkamah Rayuan pada 13.10.2008 Yang Arif-Yang Arif Hakim Mahkamah Rayuan yang bijaksana telah terkhilaf apabila tidak menerima dan mengesahkan keputusan Hakim Mahkamah Tinggi, khususnya penghakiman di perenggan kedua dari terakhir dalam alasan penghakiman beliau seperti berikut:–

> Mengikut keterangan, kain cadar yang menutup tilam dan katil telah diberikan kepada Jabatan Kimia untuk dianalisa. Hasil dari pemeriksaan Ahli Kimia tiada sebarang kesan air mani atau darah ditemui dari cadar tersebut. Sesungguhnya keterangan pengadu menghubung dengan episode apa yang berlaku adalah tidak konsisten dengan penemuan Ahli Kimia. Akibatnya sedikit banyak timbullah keraguan terhadap keterangan pengadu samaada berlaku persetubuhan seperti yang didakwa.

Yang Arif Hakim Mahkamah Tinggi telah membuat satu keputusan kukuh yang menimbulkan lebih daripada keraguan yang munasabah terhadap keterangan pengadu dimana keterangan tersebut bersifat bercanggah dan tidak konsisten. Keterangan pengadu tidak mempunyai kebolehpercayaan dan maka itu persoalan sokongan bagi keterangan tersebut tidak timbul.

8. Kes bagi pendakwaan amat bersandar kepada keterangan SP4, Baktiar bin Kassim, iaitu Ahli Kimia; SP10, Dr Chung Lay Hong iaitu doktor yang memeriksa pengadu; dan SP15, Ragespari a/p Arunanidi, iaitu pegawai penyiasat. Intipati utama dalam kes pendakwaan ialah unsur yang akhirnya meranapkan kes pendakwaan sendiri.

9. Merujuk kepada alasan-alasan sepertimana di atas, saya dengan segala hormatnya menyatakan bahawa Mahkamah Rayuan harus menggunapakai kuasa yang sedia ada untuk membetulkan ketidakadilan yang manifes ini. Kes responden ialah satu kes yang khas dan yang bermerit bagi memohon kepada Mahkamah Yang Mulia ini bagi satu perintah seperti yang dipohon atau bagi apa jua perintah lain yang difikirkan sesuai dan manfaat oleh Mahkamah Yang Mulia ini.

(My Translation

5. A copy of the record of appeal and petition of appeal is exhibited hereto and marked collectively as 'KS1'.

6. I hereby respectfully aver that full reference will be made to the record of appeal and the petition of appeal on the date of hearing of this application.

7. I hereby respectfully aver that at the hearing of this appeal in the Court of Appeal on 13.10.2008, their Lordships the learned Judges of the Court of Appeal erred in not accepting and affirming the decision of the High Court Judge, in particular the penultimate paragraph of his judgment as follows:

> According to the evidence, the bedsheet which covered the mattress and the bed had been handed to the Chemistry Department for analysis. The result of the Chemist's examination: no trace of seminal fluid and blood from the bedsheet. Actually, the complainant's evidence in relation to what had

happened in the episode was not consistent with the finding of the Chemist. Consequently, some doubt was raised in the complainant's evidence as to whether sexual intercourse had taken place as alleged.

The learned Judge of the High Court had made a firm decision which raised more than a reasonable doubt in the complainant's evidence which was contradictory and inconsistent. The complainant's evidence lacked credibility and so corroboration for that evidence did not arise.

8. The prosecution's case relied heavily on the evidence of PW4 Baktiar bin Kassim, the Chemist; PW10 Dr Chung Lay Hong, the doctor who examined the complainant; and PW15 Ragespari a/p Arunanidi, the investigating officer. The main ingredient in the prosecution's case has eventually destroyed its own case.

9. By reference to the above grounds, I respectfully aver that the Court of Appeal ought to exercise its inherent powers to correct this manifest injustice. The respondent's case is a special case which merits applying to this Honourable Court for an order in terms or such other order which this Honourable Court deems fit and proper.)

PRELIMINARY OBJECTION

[6] The learned deputy public prosecutor Mr Awang Armadajaya (assisted by Mr Murtazadi bin Amran) raised a preliminary objection on the ground that this court has no jurisdiction to hear this notice of motion.

[7] The applicant's learned counsel Mr Karpal Singh (assisted Mr CC Lim) relied on 'the review jurisdiction' of this court which he submitted has been dealt with in detail in *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 (CA), and cited with approval by the Federal Court in *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201 (FC). He also sought support in *Taylor and another v Lawrence and another* [2002] 2 All ER 353; *Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550; and *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192; [2009] 5 CLJ 445 (CA). They asked this court to exercise its inherent powers to set aside the order made by this court on 13 October 2008.

[8] These submissions bring into focus two issues. They are:

(a) the true nature of the instant application; and

(b) 'the inherent powers' of this court.

TRUE NATURE OF APPLICATION

[9] It is pertinent for me to determine the true nature of the instant

application. I note that the accused's notice of motion made no mention whatsoever of 'review jurisdiction'. The accused cannot be assumed to have asked the Court of Appeal to invoke 'review jurisdiction'. That being the case, the accused's reliance on 'review jurisdiction' is wholly without any foundation.

[10] The accused's notice of motion is in substance a notice of appeal. The accused was in fact dissatisfied with the conviction and sentence meted out by the Court of Appeal in the disposal of his final appeal. Against the conviction and sentence, he has preferred his appeal, by way of an application which was couched in the notice of motion. He sought to persuade the Court of Appeal to set aside the conviction and sentence of the court with equal standing. The supporting affidavit is in effect a petition of appeal. It states shortly the substance of the judgment appealed against and contains definite particulars of points of law or fact which the Court of Appeal was alleged to have erred. The notice of motion and supporting affidavit collectively revolve around a relitigation in the same set of proceedings in which the issue had already been concluded in the prior proceedings in the Court of Appeal. The accused is actually moving this court to invoke inherent powers in order to exercise criminal appellate jurisdiction which this court has already exercised in the prior proceedings. The notice of motion is legally unsustainable as the Court of Appeal does not have the jurisdiction to hear and determine an appeal against the decision of the same court, in view of art 121(1B) of the Federal Constitution ('art 121(1B)') read with s 50(1) of the Courts of Judicature Act 1964 ('s 50(1)').

[11] Article 121, reads:

> 121 Judicial power of the Federation
>
> (1B)There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.
>
> *[Am. Act A1260]*

[12] Section 50(1) confers criminal appellate jurisdiction upon the Court of Appeal in the following words:

> 50 Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect

of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[13] Pursuant to s 50(1), the Court of Appeal may exercise criminal appellate jurisdiction to hear and determine criminal appeals:

(a) where the appeal is against any decision of the High Court in the exercise of the High Court's original jurisdiction; and

(b) where the appeal is against the decision of the High Court in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal matter decided by the sessions court.

[14] The Court of Appeal does not have any criminal appellate jurisdiction to hear and determine criminal appeals which had finally been disposed of by the same court. Article 121(1B) and s 50(1) have never contemplated the existence of the inherent powers of the Court of Appeal in the exercise of criminal appellate jurisdiction. The jurisdiction of the Court of Appeal is so important that Parliament has deemed it necessary to enshrine it in the Federal Constitution which is the supreme law of the land under art 4 thereof. The importance of this jurisdiction is reaffirmed by Parliament when it enacted s 50(1) which, in terms of supremacy in relation to any other written law, is only one step below the Federal Constitution. This has been expressly provided under s 4 of the same Act ie the provisions of this Act shall prevail, in the event of inconsistency or conflict between this Act and any other written law other than the Federal Constitution in force at the commencement of this Act. In the circumstances, I hold that the instant application, which in fact is an appeal against the earlier order of the Court of Appeal, is beyond the jurisdiction of the Court of Appeal, as set out in art 121(1B) and s 50(1).

INHERENT POWERS

[15] In considering the second and final issue based on 'inherent powers' of the Court of Appeal, it is necessary for me to examine the position in the Federal Court and the Court of Appeal respectively.

[16] In the Federal Court, inherent powers in the context of 'review jurisdiction' was discussed in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517. The issue was whether r 137 of the Rules of the Federal Court 1995 ('r 137') confers 'review jurisdiction' on the Federal Court. Rule 137 reads as follows:

Rule 137 Inherent powers of the Court

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court *to hear any application or* to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (Emphasis added.)

[17] In essence, Abdul Malek Ahmad PCA (as he then was) in paras 44–45 held that the *Federal Court has the jurisdiction to hear an application under r 137* where it is found necessary to prevent injustice or to prevent an abuse of the process of the Federal Court.

[18] In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] 6 CLJ 1 (FC), Abdul Hamid Mohamad CJ in paras 4–12 stressed that the 'review jurisdiction' is limited in scope, as shown below:

[4] In *an application for a review by this court* of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. *Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such*. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts. (Emphasis added.)

See:

(1) *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166; [1985] 2 CLJ 423; [1985] CLJ (Rep) 196.

(2) *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565.

(3) *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350, in particular the dissenting judgment of Abdul Hamid Mohamad FCJ.

(4) *Tai Chai Yu v The Chief Registrar of the Federal Court* [1998] 2 MLJ 474; [1998] 2 CLJ 358.

(5) *Chan Yock Cher v Chan Teong Peng* [2005] 4 CLJ 29.

(6) *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.

[5] Coming back to r 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201. In the former case I concluded:

In other words, r 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes. (Emphasis is added.)

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances.

[7] First, where there is a lack of quorum as in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.

[8] Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577.

[9] Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court in *Adorna Properties Sdn Bhd v Kobchai Sosotikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565 does throw some light in this respect.

[10] Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v Sukraj Rai and others* AIR 1941 FC 1.

[11] Fifthly, where bias has been established as in *Taylor and another v Lawrence and another* [2002] 2 All ER 353.

[12] Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts.

[19] In considering r 137 in the same case ie *Asean Security Paper Mills Sdn Bhd*, Zaki Azmi PCA (now Chief Justice) in the following paragraphs, has this to say:

A [29] It will be noticed that the rule starts with the words 'For the removal of doubts …' It is therefore clear that this rule does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the court. It is merely a reminder that this court has that inherent jurisdiction.

...

B Inherent Jurisdiction

[36] What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, 'inherent' means 'existing in something, esp. as a permanent or characteristic attribute'. In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure C fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

[37] The *Halsbury's Laws of England*, (4th Ed) in Vol 37 at para 12 refers to 'inherent jurisdiction' as follows:

D

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, E to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[38] In *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn* [1981] 1 All ER 289 at p 295, Lord Diplock explained that 'inherent power' and 'inherent jurisdiction' were confined to the doing by the court of acts which it needs F *must have power to do in order to maintain its character as a court of justice*. (Emphasis added.)

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own G decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is H within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.

[45] There must be a finality to deciding any dispute. It cannot be reviewed ad infinitum. It must end somewhere and in our system, it is the Federal Court. If there I is any intention that r 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself (see art 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201).

[20] In *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201 in paras 46, 47 and 51, Arifin Zakaria FCJ (now CJ (Malaya)), in construing r 137 stressed that:

(a) The purpose and scope of the Rules of the Federal Court 1995 made under ss 16 and 17 of the Courts of Judicature Act 1964 is for regulating the practice and procedure to be followed by the Federal Court in all causes and matters whatsoever in or with respect to which the Federal Court has for the time being jurisdiction.

(b) But as a subsidiary legislation, it cannot exceed the powers conferred by the statute pursuant to which it is made. Therefore, it cannot purport to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights. Therefore, it will be ultra vires the powers of the Rules Committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction.

(c) This rule must strictly be confined to procedural matter only. Rule 137 could not have been intended to override the provision of the Federal Constitution or any other written law.

[21] In addition to and in continuation of the principles set out in para 20(a), (b) and (c) above, it is useful to summarise other relevant principles which may be distilled from the above Federal Court judgments in relation to the scope of r 137, as follows:

(a) The application must expressly seek the invocation of 'review jurisdiction' by the Federal Court.

(b) The Federal Court cannot position itself as if it were hearing an appeal and decide the case as such.

(c) Rule 137 cannot be so construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 and other statutes.

(d) Rule 137 does not actually confer the jurisdiction to hear any application. It is merely a reminder that the Federal Court has that inherent jurisdiction.

[22] It is interesting to note that in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 ; [2010] 7 CLJ 397 (FC), Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ expressed the majority view that under r 137, the Federal Court may exercise 'review jurisdiction' in limited circumstances. At pp 193–194 (MLJ); 437–438 (CLJ) and pp 197–198 (MLJ); 441–442 (CLJ), Mohd Ghazali Mohd Yusoff FCJ, in a minority judgment, held that 'in light of art 121(2) of the Federal Constitution ('FC')

and ss 86 and 87 of the Courts of Judicature Act 1964 ('CJA'), the Federal Court has no power to review its own judgment. The word 'review' does not appear at all in art 121(2) of the FC or ss 86 and 87 of the CJA or even r 137 of the RFC for that matter. There is not even an indication that this court can exercise the power of review; such power cannot be implied … the powers of the Federal Court cannot be enlarged through the Rules of the Federal Court 1995. Only an Act of Parliament can do that. It is incorrect to say that on an application by a party to an appeal already decided by this court, this court has the power to rehear the appeal and review its earlier decision. Rule 137of the RFC surely does not confer such a power'.

[23] So much for the 'review jurisdiction' of the Federal Court.

[24] In relation to the Court of Appeal, an analysis of its inherent powers must be preceded by a discussion of the jurisdiction of the Court of Appeal. This is enshrined in art 121(1B) and s 50(1). These statutory provisions brought about the creation and establishment of the Court of Appeal in 1994.

[25] As the instant application concerns a criminal cause or matter, the federal law which confers jurisdiction in such criminal cause or matter is to be found in s 50(1). The substantive provisions enacted in art 121(1B) and s 50(1) do not contain any provision which can be construed as conferring any 'review jurisdiction' or 'inherent powers' on the Court of Appeal.

[26] In examining the 'review jurisdiction' of the Court of Appeal, it is significant to note that r 137 empowers the Federal Court 'to hear any application'. Rule 137 applies only to the Federal Court. It is not part of the Rules of the Court of Appeal 1994. Hence, the Federal Court judgments, which held that under r 137 the Federal Court is conferred with 'review jurisdiction', are of no assistance to the accused in the instant application.

[27] Apparently, 'inherent powers' and 'review jurisdiction' emerged for the first time in the Court of Appeal in *Ramanathan a/l Chelliah*. There, the accused was convicted by the sessions court on two charges of outraging of modesty under s 354 of the Penal Code. The accused appealed to the High Court. The High Court held for the accused and quashed the conviction. The public prosecutor being dissatisfied with the acquittal appealed to the Court of Appeal. A differently constituted bench allowed the appeal and reinstated the conviction ('order of the first coram'). The accused then applied to set aside the order before another coram of the Court of Appeal ('the second coram'). The second coram set aside the order of the first coram and gave certain directions. The second coram addressed two issues, the first of which is relevant. It is whether the second coram of the Court of Appeal has jurisdiction to review its earlier decision in an appeal heard and disposed of by the first coram.

[28] In relation to 'review jurisdiction', Gopal Sri Ram JCA (later FCJ) at pp 218–219 spoke for the Court as follows: A

> It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See *Taylor and another v Lawrence and another* [2002] EWCA Civ 90, where it was held as follows: B
>
> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. C D
>
> See also *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.
>
> We are of the view that it is important to recognise that this court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected. E F

[29] The reasoning in the judgment in *Taylor v Lawrence*, is now reflected in the (English) CPR 52.17, which merits reproduction as follows:

> THE APPLICATION OF THE PRINCIPLES OF TAYLOR V LAWRENCE
>
> [4] CPR 52.17 is headed 'Reopening of final appeals'. Rule 52.17(1) provides: G
>
> The Court of Appeal or the High Court will not reopen a final determination of any appeal unless — (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy. H

[30] *Taylor v Lawrence*, was referred to in *Re Uddin*, which was a renewed application for further consideration of the earlier refusal of the (English) Court of Appeal to grant permission to appeal. The Court of Appeal speaking through Dame Elizabeth Butler-Sloss P refused the renewed application. I

[31] *Taylor v Lawrence*; and *Re Uddin*, were discussed in *Abdullah bin Idris*, where the Court of Appeal as the apex court has finally heard an appeal from

the sessions court. The convicted person made an application by way of notice of motion in the same Court, and sought an order that the Court of Appeal (by using its inherent powers under O 92 r 4of the Rules of the High Court 1980 ('O 92 r 4')) to set aside the earlier order of the Court of Appeal. In essence, James Foong JCA (now FCJ) delivering the judgment for the Court of Appeal held, inter alia, as follows:

(a) *Rule 137 is similar to O 92 r 4* which applies mutatis mutandis to the Court of Appeal by virtue of r 4 of the Rules of the Court of Appeal 1994. Rule 137 does not confer jurisdiction on the Federal Court to review its own decision.

(b) Notwithstanding that r 137 does not confer any jurisdiction on the Federal Court, the court in very limited and exceptional cases, nevertheless has the inherent jurisdiction to review its own decision. Likewise, the Court of Appeal is seised with jurisdiction, not from O 92 r 4, but from a residual, implicit or implied form which makes no distinction between civil and criminal cases and within limited circumstances.

[32] In both *Abdullah bin Idris* and *Ramanathan a/l Chelliah*, the Court of Appeal invoked 'the inherent, residual, implicit or implied jurisdiction' by following the common law rule enunciated in *Taylor v Lawrence* and *Re Uddin*.

[33] It is my respectful view that the judgments of the (English) Court of Appeal in *Taylor and another v Lawrence and another*, and *Re Uddin*, were not concerned with the construction or interpretation of the statutory provisions enacted in our art 121(1B), s 50(1) and O 92 r 4.

[34] In Malaysia, the jurisdiction of the Court of Appeal is to be determined by reference to our own statutory provisions viz art 121(1B), s 50(1) and O 92 r 4. We do not have CPR 52.17. As different statutory provisions are called into question, the aforesaid two English cases are readily distinguishable. Likewise, *Abdullah bin Idris* and *Ramanathan a/l Chelliah*, which followed the two English judgments are also clearly distinguishable.

RULE 137 AND O 92 R 4

[35] With the utmost respect, while r 137 and O 92 r 4 are somewhat similar, they are not identical. Rule 4 of the Rules of the Court of Appeal 1994 has transplanted or supplanted O 92 r 4 into the 1994 Rules. Order 92 r 4 merits reproduction as follows:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[36] The obvious difference between r 137 and O 92 r 4 is that the words 'to hear any application or' which appear in r 137 are not to be found in O 92 r 4. In my view, these words in r 137 are of critical importance. They empower the Federal Court to exercise the jurisdiction to hear any application, which had subsequently led to the enunciation of the 'review jurisdiction' of the Federal Court ie to review the earlier decision of another panel of the Federal Court with a view to setting it aside.

[37] In O 92 r 4, the exclusion of the words 'to hear any application or' is not without significance. Such exclusion means that O 92 r 4 is not intended to empower the Court of Appeal to hear the type of application which the Federal Court has jurisdiction to hear under r 137 and to invoke the 'review jurisdiction'. Order 92 r 4 does not provide for the hearing of such an application to set aside an earlier order of the Court of Appeal. The 'inherent powers' of the Court of Appeal 'to make any order as may be necessary to prevent injustice' etc is only to be exercised by the Court of Appeal, if at all, in matters pertaining to practice and procedure and only in the same proceedings. The inherent powers of the Court of Appeal cannot be stretched to include the hearing of a subsequent application in order to invoke the 'review jurisdiction' and to set aside an earlier decision of the Court of Appeal, as the word 'review' has never been part of O 92 r 4.

REVIEW JURISDICTION AND STATUTE

[38] As alluded to above, the word 'review' does not appear at all in art 121(1B), s 50(1) and O 92 r 4. By way of contrast, the word 'review' in the context of 'judicial review' has been expressly enacted in O 53, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word 'review' in art 121(1B), s 50(1) and O 92 r 4 means that no review jurisdiction has ever been conferred upon the Court of Appeal when it was created in 1994.

[39] In *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed) (Vol 3: P–Z) the word 'review', where relevant, is explained as follows:

> Where a decision is to be reviewed, the reviewing body will normally examine the lawfulness of the decision in question, as in the expression 'judicial review' or whether that decision is safe, or well-founded, as in the title of the Criminal Cases Review Commission. (*Kataria v Essex Strategic Health Authority* [2004] 3 All ER 572 at 581, QBD per Stanley Burnton J.)

[40] In *KJ Aiyer's Judicial Dictionary* (13th Ed), the dictionary meaning of the word 'review' is adopted in the following passages:

> According to the Chamber's Twentieth Century Dictionary the word 'review' is reconsideration and as verb it means to see or examine again. According to the Webster's Seventh New Collegiate Dictionary, the word 'review' means renewed study of material previously studied. [*Roshanlal Poddar v State* [1975] 79 Cal WN 816, 1975 CrLJ 1583].
>
> The term 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances. [*Gopinath Deb v Budhia Swain* [1982] 54 Cut LT 515 (DB)].
>
> *Review is a statutory remedy* for reconsidering the order due to error apparent on the face of the record or due to discovery of some new and important evidence or any sufficient cause …'. (Emphasis added.)

[41] Authorities abound to support the proposition that the conferment of 'review jurisdiction' is not by way of inherent powers. 'Review jurisdiction' must be expressly provided by statute. Illustrations are found in:

(a) *Harbhajan Singh v Karam Singh* AIR 1966 SC 641: At p 642 Ramaswami J held that the court's power to review must be given by statute.

(b) *Drew and another v Willis, ex parte Willis* [1891] 1 QB 450: Lord Esher MR pointed out that no court has a power of setting aside an order which has been properly made, unless it is given by statute.

(c) *Anantharaju Shetty v Appu Hegade* AIR 1919 Madras 244: Seshagiri Aiyar J of the Madras High Court observed:

> It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature had indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least good reason for saying that such power should not be exercised unless the statute gives it, …

(d) *Trilok Singh Dutta and Ors v State Transport Authority, Bihar* AIR 1985 Pat 87: At p 88, Ashwini Kumar Sinha J said that it is well settled that the power of review is not an inherent power but is created by statute and expressly conferred by the statute. The power of review has always been held to be a creature of statute.

(e) *SJS Fernandes v V Ranganayakulu Chetty* AIR 1953 Mad 236: At p 237 Ramaswami J echoed the same sentiment when he said that so far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be

conferred by statute.

FINALITY

[42] It is in the interest of the state and the public that there is finality in litigation. In *Venkata Narasimha Appa Row v The Court of Wards and others* (1886) 11 App Cas 660, in delivering his speech in the House of Lords, Lord Watson said at p 664:

> There is a salutary maxim which ought to be observed by all courts of last resort — Interest *reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

CONCLUSION

[43] On the foregoing grounds, I am of the view that there is substance in the prosecution's preliminary objection. I therefore hold that this court has no jurisdiction to hear the notice of motion. My answer to the aforesaid question is in the negative. The instant application is dismissed in limine.

Zaharah Ibrahim JCA:

[44] The applicant's application to this court in *encl 27a* is for an order that this court uses its 'inherent power' and sets aside the order of the Court of Appeal given on 13 October 2008, allowing the public prosecutor's appeal against the decision of the High Court in Malaya at Seremban in Criminal Appeal No 42–7 of 2000. In that appeal, the Court of Appeal restored the decision of the sessions court which convicted the applicant and sentenced him to imprisonment for a term of 15 years from 13 October 2008 and five strokes of whipping.

THE PRELIMINARY OBJECTION

[45] At the outset, the public prosecutor, through Deputy Public Prosecutor Awang Armadajaya Awang Mahmud ('DPP Awang Armadajaya'), raised a preliminary objection that this court has no jurisdiction and consequently no power to review its own earlier decision, much less to set it aside.

[46] We indicated that we would first deal with the jurisdictional issue raised in the preliminary objection. The actual application will only be heard if we

find that we *do* have the necessary jurisdiction to hear it.

THE SUBMISSIONS

[47] Mr Karpal Singh, learned counsel for the applicant, submitted that this court has the jurisdiction to review its own earlier decision. Reliance was placed on the Court of Appeal cases of *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 ('*Ramanathan*'s case') and in *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192; [2009] 5 CLJ 445 ('*Abdullah bin Idris*' case').

[48] Mr Karpal also relied on the Federal Court case of *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201, as well as the cases of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] 6 CLJ 1 and *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833, all of which were referred to in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 ; [2010] 7 CLJ 397; [2010] 5 AMR 677 ('*Dato' Seri Anwar*'s case').

[49] Mr Karpal conceded that O 92 r 4 of the Rules of the High Court 1980 (which is made applicable, mutatis mutandis, to the Court of Appeal by r 4 of the Rules of the Court of Appeal 1994) does not confer upon the Court of Appeal the jurisdiction to review its own decision. It appears therefore that the applicant is not relying on O 92 r 4 for this application.

[50] For the public prosecutor, DPP Awang Armadajaya submitted that the court ought to follow the decision of Mohd Ghazali Mohd Yusoff FCJ, in *Dato' Seri Anwar*'s case.

[51] According to DPP Awang Armadajaya, that decision was subsequently followed in the Federal Court case (in which DPP Awang Armadajaya represented the public prosecutor) involving the application of one Abdul Razak bin Dalek ('Abdul Razak Dalek's application') for the review of an earlier Federal Court decision affirming his conviction and sentence for murder.

[52] Unfortunately, the judgment in Abdul Razak Dalek's application is not available to us. However, it appears from the news report published in the newspaper *The Sun* on 12 August 2010 (a copy of which is found in the applicant's bundle of authorities) that Abdul Razak Dalek's application was dismissed by the Federal Court upon a preliminary objection being raised by DPP Awang Armadajaya for the public prosecutor that the Federal Court has no jurisdiction to hear the review application.

THE ISSUE

[53] The present Court of Appeal was created in 1994 to be an intermediate superior court between the High Court and the Federal Court.

[54] For cases decided by the High Court in its original jurisdiction, the Court of Appeal is a first tier appeal court. For cases decided by the High Court in its appellate jurisdiction it is a second tier and final tier appeal court. The Federal Court, according to ss 87 and s 96 of the Courts of Judicature Act 1964 ('the CJA'), is only conferred jurisdiction to hear appeals from decisions of the Court of Appeal in its appellate jurisdiction in respect of a matter decided by the High Court in its original jurisdiction.

[55] It is in the context of the Court of Appeal being the final tier appellate court for cases originating from the sessions court that this application was made. The rationale for this application by the applicant is that since the decision of the Court of Appeal on his substantive appeal earlier cannot be appealed against to the Federal Court, the only way for the applicant to have what he alleges to be an error committed by the Court of Appeal in that earlier decision corrected is to have the case reviewed and the earlier decision set aside. In other words, the applicant has no other recourse and no alternative remedy.

[56] The sole issue for determination at this stage is therefore whether the Court of Appeal has the jurisdiction to review its earlier decision made after hearing the parties in the appeal before it.

JURISDICTION OF THE COURT OF APPEAL

[57] Article 121 cl (1B) of the Federal Constitution, by which the Court of Appeal was created, is as follows:

> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say —
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

[58] The CJA sets out in detail the limits of the jurisdiction conferred on the Court of Appeal. For criminal cases, sub-s 50(1) of the CJA confers upon it the jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction or in the exercise of its appellate or revisionary jurisdiction in respect of matters decided by the sessions court or, with the leave of the Court of Appeal, in respect of matters decided by a magistrates court.

[59] It is not in dispute that nothing in s 50 of the CJA, or in any other provisions of the CJA, or in any other federal law, or in any subsidiary legislation made under a federal law, confers upon the Court of Appeal the jurisdiction to review any matter which it has heard and finally determined, except in the circumstances set out in s 42 and 44 of the CJA.

[60] In *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 the Supreme Court held that where:

> ... a final decision has been delivered, an appeal is in effect heard and disposed off. In other words, it has been brought to a final conclusion. And that being the case, the Supreme Court has no power to reopen, rehear and re-examine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by s 42, in particular sub-s (3) of s 42. The other exception is as provided under s 44 sub-s (3) to the effect that every order such as that envisaged in sub-s (1) of s 44 may be discharged or varied by the full Court.

[61] Upon the creation of the Court of Appeal, the same s 42 and s 44 of the CJA were made applicable to it (with a new Part IV being created in the CJA to deal with the jurisdiction, powers and matters relating to the Federal Court).

[62] Subsection 42(3) of the CJA has since been repealed. However, sub-s 42(2) still provides for the rehearing of an appeal in cases where a matter is not determined by a majority of judges of the Court of Appeal.

[63] The case of *Lye Thai Sang* implies that since the CJA only provides for those two instances where the court may revisit its earlier decision, it is not the intention of the Legislature that the court should be allowed to reopen or revisit its earlier decisions in any other case.

[64] If the Court of Appeal does not have statutory jurisdiction to review its earlier decisions, does it have an 'inherent jurisdiction' to do so?

INHERENT JURISDICTION

[65] In *Ramanathan*'s case and in *Abdullah bin Idris*' case the decision of the English Court of Appeal in *Taylor and another v Lawrence and another* [2002] 2 All ER 353 ('*Taylor v Lawrence*') was referred to and followed.

[66] In *Taylor v Lawrence*, Lord Woolf CJ said that the Court of Appeal was:

> ... established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents.

[67] His Lordship then went on to say that the Court of Appeal was established with the broad jurisdiction to hear appeals. It was not established to exercise an originating as opposed to an appellate jurisdiction. 'It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit power to do that which is necessary to achieve the dual objectives of an appellate court' which he had referred to earlier.

[68] In *Ramanathan*'s case, an earlier decision of the Court of Appeal was reviewed and set aside (and the original appeal ordered to be re-heard before another panel) based on the 'residual jurisdiction' or 'implied jurisdiction' that Lord Woolf refers to in *Taylor v Lawrence*.

[69] Does the Court of Appeal have any inherent or residual jurisdiction to review and set aside its earlier decisions?

[70] Under the Federation of Malaya Agreement 1948, the Supreme Court of the Federation of Malaya (consisting of the High Court and Court of Appeal) was granted 'unlimited civil and criminal jurisdiction'. Upon independence, the Supreme Court of the 1948 Federation of Malaya ('pre-independence Supreme Court') continued, under art 121 of the Federal Constitution, as the Supreme Court of the independent Federation of Malaya by virtue of the art 172 of the Federal Constitution Article 172 was repealed in 1963, but without prejudice to the continuation of the courts referred to in that article.

[71] Article 121 cl (1) of the Federal Constitution vested judicial power of the Federation in the Supreme Court of Malaya. However, on Malaysia Day, art 121 cl (1) was amended and judicial power remained vested only in the High Courts. The Federal Court had only the jurisdiction that was set out in art 121 cl (2). In 1988, even the words 'judicial power' had been deleted from art 121 cl (1). The words 'judicial power' however remained in the marginal note to that article, and subsequently when the Federal Constitution was reprinted, the current version has those words in the shoulder note to that article. A discussion on the implication of the presence of those words in the shoulder note of art 121 is found in the judgment of Heliliah Mohd Yusof FCJ, in *Dato' Seri Anwar*'s case.

[72] It could perhaps be argued that the High Courts and the Federal Court could draw upon their historical jurisdiction referred to above as a basis for claiming the existence of an 'inherent' or a 'residual' jurisdiction. That same argument cannot possibly apply to the Court of Appeal which was only created in 1994.

[73] Even in the case of the pre-independence Supreme Court, His Lordship Thomson CJ in the case of *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] MLJ 1 at p 3, concluded that since cl 77 of the Federation of Malaya Agreement 1948, which granted the court 'unlimited jurisdiction', also provided that its constitution, powers and procedure may be prescribed by Federal Ordinance, the words 'unlimited jurisdiction' merely mean 'that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires judicial power to be exercised'. In other words, the 'unlimited jurisdiction' of the pre-independence Supreme Court was circumscribed by whatever power that may have been given to it by law.

[74] If the pre-independence Supreme Court with 'unlimited jurisdiction' still required to be given powers by law before it can exercise that jurisdiction, a court with no such unlimited jurisdiction, this court being one such court, must certainly need to be given such powers before it can exercise them.

[75] As mentioned above, there is no dispute that no statute, whether 'Federal law' (as defined in art 162 cl (2) of the Federal Constitution), or 'written law' as defined in s 3 of the Interpretation Acts 1948 and 1967, provides for the jurisdiction or power of the Court of Appeal to review a matter which it has already finally determined, except in the circumstances provided for in s 42 and s 44 of the CJA.

[76] Where common law is concerned, Heliliah Mohd Yusof FCJ, in *Dato' Seri Anwar*'s case agreed with the dissenting judgment of Abdul Hamid Mohamad FCJ, (as His Lordship then was) in *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350; [2004] 5 AMR 709 that para s 3(1)(a) of the Civil Law Act 1956 is not applicable as a source of additional jurisdiction of the Federal Court.

[77] More importantly, Her Ladyship also referred to the case of *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201; [2008] 4 AMR 583 in which Abdul Hamid Mohamad CJ, pointed out that the provisions of the Civil Law Act 1956 have no application in criminal cases. Indeed, the long title to the Civil Law Act 1956 states that it is an 'Act relating to the civil law to be administered in Malaysia'.

[78] There being no statutory provision which can apply the common law of England to a situation such as that before this court in this application, the common law of England cannot be drawn upon to found the basis of an inherent jurisdiction or power that we are urged to exercise.

[79] In *Taylor v Lawrence*, Lord Woolf (at p 368 of the judgment) quoted the words of Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v*

South India Shipping Corpn [1981] AC 909 at p 977; [1981] 1 All ER 289 at p 295, ('the *Bremer Vulcan* case') in particular the words 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' and said that those words 'express the situation here under consideration exactly'.

[80] Reliance was also placed, in *Taylor v Lawrence*, on the following oft-quoted speech of Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1301; [1964] 2 All ER 401 at p 409:

> There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and any attempted thwarting of its process.

[81] Neither in the *Bremer Vulcan* case nor in *Connelly v Director of Public Prosecutions* did the court consider the issue of a court reopening, rehearing, re-examining or reviewing a matter which it had finally determined.

[82] In the *Bremer Vulcan* case the power that Lord Diplock was speaking of was the High Court's power to dismiss a pending civil action for want of prosecution. *Connelly v Director of Public Prosecutions* dealt with the question of whether a person can be prosecuted for the offence of robbery after he had been acquitted of murder. The issue there was whether the prosecution for robbery was an abuse of the process of the court.

[83] Prior to *Taylor v Lawrence*, the statement of Lord Morris was considered by Ward LJ in the English Court of Appeal case of *Wicks v Wicks* [1998] 1 All ER 977. That case dealt with the issue of whether the court had the power to order the sale of property and to apply the proceeds of the sale to meet a wife's claim for ancillary relief.

[84] His Lordship Ward LJ was referred to Sir Jack Jacob's article on *The Inherent Jurisdiction of the Court*, 1970 Current Legal Problems 23 and to the above quoted speech of Lord Morris of Borth-y-Gest, and said:

> I regret I cannot accept those submissions for these reasons:
>
> (1) There is powerful authority rejecting the contention that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure that justice be done between the parties. This is too wide and sweeping a contention to be acceptable: see Lord Hailsham's curt dismissal of Lord Denning's attempt to do justice in *Siskina (Cargo Owners) v Distos SA* [1979] AC 210, 262 and also Ackner LJ's comments in *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, 942. The fact that these were cases dealing with the

impact of inherent jurisdiction on the power to make injunctions does not seem to me to devalue the strength of the critical observations.

(2) In my judgment, it seems upon proper analysis that the power the applicant wives were inviting the court to assume was not a procedural power to control the court's process but a substantive power affecting the right of the applicant to the relief which she was seeking. The need to distinguish between procedural rights and substantive rights was clearly drawn in *Moore v Assignment Courier Ltd* [1977] 1 WLR 638. Here the claims were for possession of demised premises on the grounds of forfeiture for breaches of covenant, and also for mesne profit. The issue raised was whether, pending a determination of the landlord's forfeiture action, the landlord was entitled to be paid a periodic interim sum for the use of the land. Section 20 of the Administration of Justice Act 1969 had empowered the court to make rules requiring a party to make an interim payment of debt or damages. No rules had yet been made. The claim was, therefore, brought under the inherent jurisdiction relying on a dictum of Lord Denning MR in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, 156D:

> These courts are masters of their own procedure and can do what is right even though it is not contained in the rules.

Of that Sir John Pennycuick said at 642:

I think that in its context that sentence is plainly addressed to matters of procedure and is not intended to say that the court can, in matters of substantive right, do whatever the court thinks fair, apart from the principles applicable under either the general law or the Rules of the Supreme Court.

The same reasoning applies here. Under the cloak of ensuring fair play, the judge was in fact making orders affecting the parties' substantive rights and that must be governed by the general law and rules, not by resort to a wide judicial discretion derived from the court's inherent jurisdiction.

In his interesting article, *The Inherent Jurisdiction To Regulate Civil Proceedings* [1997] 113 LQR 120,131 Professor Dockray writes:

... a matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent … Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants. Procedural revolutions should appear first in statutes or in the rules of court, not in the law reports.

[85] In *Dato' Seri Anwar*'s case Mohd Ghazali Mohd Yusoff FCJ, came to the conclusion that the Federal Court has not been granted power by the Federal Constitution or the CJA or even r 137 of the Rules of the Federal Court to review its own decision.

[86] After referring to several English and Indian cases, and the same article by Professor Dockray referred to in *Wicks v Wicks* (different parts of which were quoted by His Lordship), Mohd Ghazali Mohd Yusoff FCJ, was also of the view that the Federal Court has no inherent power to review its own decision. He said:

> Since this court has no power to review its own decision given in an appeal it has already heard and disposed of, I cannot see how it can be said that there are exceptions to this right to review as suggested by some earlier decisions of this court or that the power of review can be exercised in exceptional circumstances but should be exercised sparingly.

[87] His Lordship's reasons and conclusions apply equally to the Court of Appeal as they apply to the Federal Court.

[88] It was pointed out to this court by learned counsel for the applicant that His Lordship's views constituted a 'minority view' in that the other two members of the same panel, while dismissing the application before them, were of the view that, in exceptional circumstances, there can be a review of a decision of the Federal Court.

[89] As has been mentioned above, the judgment of the Federal Court in Abdul Razak Dalek's application is not available. However, the applicant did not dispute DPP Awang Armadajaya's version of what transpired in the hearing of that application.

[90] There is no doubt that Abdul Razak Dalek's application was dismissed on the preliminary objection that the court had no jurisdiction to review its earlier decision.

[91] In the light of the decision in Abdul Razak Dalek's application, the decision of Mohd Ghazali Mohd Yusoff FCJ, is in fact no longer a 'minority' view.

[92] On 26 August 2010, two weeks after the decision in Abdul Razak Dalek's application, the Federal Court heard an application by Felda for the review of the decision of the Federal Court on 19 January 2010 refusing leave to appeal against a decision of the Court of Appeal. A report on 26 August 2010 by *Bernama*, the national new agency, and on 27 August 2010 by the newspaper *The New Straits Times* states that the Federal Court had unanimously dismissed that application. Alauddin Mohd Sheriff PCA, who chaired the panel was reported by Bernama to have said that 'we find that we have no jurisdiction to review the previous decision of the Federal Court'.

[93] As in Abdul Razak Dalek's application, the judgment of the Federal Court in the Felda application is not yet available. However, the two decisions show that the Federal Court no longer subscribes to the view that it has jurisdiction to review its earlier decisions.

CONCLUSION

[94] In the circumstances, it is my view that the reopening, rehearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, this court has no such jurisdiction.

[95] As such jurisdiction has not been granted by the Federal Constitution or by or under any federal law, or by the common law as it is applicable in this country, this court has no jurisdiction to hear this application. The preliminary objection of the respondent is therefore allowed. This application is dismissed.

Mohd Hishamudin JCA (dissenting):

[96] By notice of motion the respondent (Ishak bin Hj Shaari) applies to this court to exercise it powers of review to review a decision of the Court of Appeal dated 13 October 2008.

[97] On 13 October 2008 the Court of Appeal had allowed the public prosecutor's appeal against the decision of the High Court of Seremban of 26 January 2005.

[98] Earlier, what had happened was, on 27 January 2000 the Sessions Court of Seremban had convicted the respondent on the offence of rape of a minor under s 376 of the Penal Code and had sentenced him to 15 years imprisonment and five strokes of whipping. He appealed to the High Court of Seremban. On 26 January 2005 the High Court of Seremban allowed his appeal and set aside the conviction and sentence.

[99] Dissatisfied with the decision of the High Court, the public prosecutor appealed to the Court of Appeal. On 13 October 2008 the Court of Appeal allowed the public prosecutor's appeal and set aside the order of the High Court, and restored the conviction recorded by the sessions court as well as the sentence imposed by the said court. In our legal system, as the appeal emanates from a judgment of a subordinate court (in the present case, a sessions court) there is no further recourse to the Federal Court. In other words, for this

particular judgment of the High Court of Seremban, should any party be aggrieved by the judgment, the Court of Appeal is the court of last resort.

[100] In applying to this court to exercise its power of review to review the earlier decision of this court, Encik Karpal Singh, learned counsel for the applicant/respondent, contends that the decision of the Court of Appeal of 13 October 2008, in allowing the public prosecutor's appeal, had failed to give due consideration to certain evidence, and hence a miscarriage of justice had been occasioned by that decision.

[101] At the commencement of the hearing of this motion, the learned deputy public prosecutor, Encik Awang Armadajaya, raises a preliminary objection and that is that a Court of Appeal has no jurisdiction or power to review its own previous decision. The learned DPP relied mainly on the judgment of Mohd Ghazali Yusoff FCJ in the recent Federal Court case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 ; [2010] 7 CLJ 397.

[102] The learned DPP also refers to art 121 of the Federal Constitution and s 50 of the Courts of Judicature Act 1964 and argues that there is nothing in either art 121 or s 50 that specifically confers on the Court of Appeal any inherent power to review its own previous decision.

[103] It has been agreed by the parties that this court shall at this stage of the hearing of the motion only confine itself to hearing the preliminary objection of the public prosecutor, and shall make a ruling solely on the issue raised in the preliminary objection. In the event this court were to rule on the preliminary objection in favour of the public prosecutor (in other words in the event that this court were to uphold the preliminary objection) then this court will proceed to dismiss the notice of motion. On the other hand, in the event the preliminary objection is dismissed, then this court will proceed to hear the substantive motion of the applicant on its merits.

[104] Now, having had the benefit of considering the submissions of the applicant and the respondent, both written and oral, I am dismissing this preliminary objection, and I shall now proceed to give my grounds.

[105] There have already been two previous judgments of the Court of Appeal that ruled that the Court of Appeal has the inherent power to review its own previous decision under exceptional circumstances in order to prevent an injustice being occasioned or to prevent an abuse of the process of the court, particularly where the previous decision was made by the Court of Appeal

sitting as a court of last resort. They are:

(a) *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215; and

(b) *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192.

[106] In *Ramanathan* members of the panel were Gopal Sri Ram JCA (as he then was), Hasan Lah JCA and Jeffrey Tan JCA. Gopal Sri Ram JCA, in delivering the unanimous judgment of the court, said (at p 218):

> [2] We will take the question of jurisdiction first. It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See *Taylor and another v Lawrence and another* [2002] EWCA Civ 90, where it was held as follows:
>
> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rule of practice, suppress any abuses of its process and defeat any attempted thwarting of its process. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.
>
> See also *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.

[107] In *Abdullah bin Idris* it was a panel of three judges comprising James Foong JCA (as he then was), Hasan Lah JCA and Sulong Matjeraie JCA. In the course of delivering the unanimous judgment of the court, James Foong JCA posed the following pertinent question:

> If r 137 of the Rules of the Federal Court which is, and I repeat, similar to O 92 r 4 of the Rules of the High Court which applies mutatis mutandis to the Court of Appeal by virtue of r 4 of the Rules of the Court of Appeal, cannot confer jurisdiction on the Federal Court how then did the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] 6 CLJ 1 derive jurisdiction to entertain a review of its own decision? Similar to the Court of Appeal, except for r 137 the Rules of the Federal Court, there is no provision in the Federal Constitution, the Courts of Judicature Act or any Federal Law conferring jurisdiction on the Federal Court to review its own decision.

[108] The learned judge then referred to certain passages of the judgments of Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA (as he then was) in the Federal Court case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo*

Insurance (Malaysia) Bhd [2008] MLJU 251; [2008] 6 CLJ 1 to explain how the Federal Court derives its inherent power to review its previous decision. That part of the judgment of James Foong JCA reads as follows (at pp 457–458):

> In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*, an application was made to the Federal Court to have a decision of the Federal Court reviewed and reheard pursuant to r 137 of the Rules of the Federal Court to prevent injustice or to prevent an abuse of the process of the court. Though Chief Justice Abdul Hamid Mohamad in that case initially reiterated that r 137 of the Rules of the Federal Court does not confer jurisdiction, he conceded:
>
> However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting *that inherent jurisdiction* may be exercised in the following instances: … (Emphasis added.)
>
> Another member of the panel in same case, Justice Zaki Tun Azmi PCA (as he then was) though agreeing with the views of the Chief Justice that r 137 of the Rules of the Federal Court confers no jurisdiction on the Federal Court to review or rehear its own case *but since it is part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction* subject to valid existing laws including the Constitution then 'that inherent power is found within the very nature of a court of law, unlike power conferred by statute'. (Emphasis added.) But he cautioned:
>
> There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decided *that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court*. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. (Emphasis added.)

[109] Having referred to the above passages of the judgments of Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA in *Asean Security Paper Mills*, James Foong JCA then put the question (at p 458):

> If the Federal Court is possessed of such inherent power to review or rehear a matter that it has previously disposed off, what about the intermediary level of the Court of Appeal on a matter that cannot be taken further to the Federal Court?

[110] Having posed the above question, the court then referred to the English Court of Appeal case of *Taylor and another v Lawrence and another*

[2002] 2 All ER 353 where Lord Woolf CJ ruled that the Court of Appeal has residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. James Foong JCA also referred to the English Court of Appeal case of *Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550.

[111] Having referred to these two English cases, James Foong JCA proceeded to make the following ruling (at pp 459–460):

> [34] When a court is armed with 'residual jurisdiction' or 'implicit or implied jurisdiction' or 'inherent jurisdiction' for 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' then I am of the view that the Court of Appeal is seized with jurisdiction, not from O 92 r 4 of the Rules of the High Court but from a residual or implicit or implied form which naturally makes no distinction between civil and criminal cases. Such inherent power applies across the board save and except within the limited circumstances as forewarned by the authorities cited above.

[112] However, at a later part of the judgment, the court, as a matter of prudence, did caution itself (at p 461):

> [38] Aside from these particular guidelines, I must add that this court, as a court of finality for cases originating from the subordinate courts, must always bear in mind that only in exceptional and limited circumstances that such application be allowed otherwise it will open the floodgate for cases that had already been decided to be relitigated. This would defeat the principle of finality in a case. Thus, when considering an application of this sort, I must echo the approach voiced by Justice Zaki Tun Azmi PCA (as he then was) that it should not 'be used liberally but only sparingly, in exceptional cases and on a case to case basis where significant injustice had probably occurred and there was no alternative effective remedy'.

[113] Encik Awang Armadajaya, however, either in his written submission or his oral submission before this court, did not refer to any of these two cases (*Ramanathan* and *Abdullah bin Idris*). At the conclusion of his oral submission, when I asked him to comment on these two cases, he merely urged this court to depart from these decisions. Can this court as the Court of Appeal depart from its previous decisions? It is unfortunate that the parties before this Court, in the course of submissions, have not addressed this issue. As I understand the law, this court, being the Court of Appeal, in civil cases, is bound by its own previous decisions (see *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293; *PM Hendry v George John de Cruz* [1949] MLJ 79; and *Kwong Yik Bank Bhd v Ansonia Management Associates Sdn Bhd* [1999] 1 MLJ 366; [1999] 1 CLJ 337). But there are exceptions, as spelt out by the United Kingdom Court of

Appeal in *Young v Bristol Aeroplane*, and they being:

(a) where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject;

(b) the Court of Appeal must refuse to follow a decision of its own which cannot stand with a decision of the Federal Court even though its decision has not been expressly overruled by the Federal Court; and

(c) the Court of Appeal need not follow a decision of its own if satisfied that it was given per incurium.

[114] In criminal matters, however, because a person's liberty may be at stake, the Court of Appeal, apart from situations (a), (b) and (c) above, may also depart from its own previous decision if satisfied that the law was misapplied or misunderstood in the previous decision. That the position in the criminal jurisdiction of the Court of Appeal should be different from that in the civil is derived from the judgment of Diplock LJ in *Regina v Gould* [1968] 2 QB 65 at pp 68–89. The relevant passage reads as follows:

> In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of stare decisis with the same rigidity as its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 as justifying the Court of Appeal in refusing to follow one of its decision in a civil case (*Rex v Taylor* [1950] 2 KB 368). A fortiori, we are bound to give effect to the law as we think it is if the previous decision to the contrary effect is one of which the ratio decidendi conflicts with that of other decisions of this court or its predecessor of coordinate jurisdiction.

[115] In the case that is now before this court, Encik Awang Armadajaya has not convinced me that based on the exceptions as laid out in *Young v Bristol Aeroplane Co Ltd* and *Regina v Gould*, I have a good and valid reason not to follow the decisions of this court in *Ramanathan* and *Abdullah bin Idris*. Hence, this court is bound by its previous decisions in *Ramanathan* and *Abdullah bin Idris*.

[116] Now, coming to the case of *Dato' Seri Anwar Ibrahim*, relied upon by the learned DPP, at the outset it must be noted that this case does not directly concern the inherent powers or jurisdiction of the Court of Appeal. Instead it directly concerns the inherent powers or jurisdiction of the Federal Court to review its own previous decision. The judgment of Mohd Ghazali Yusoff FCJ in *Dato' Seri Anwar Ibrahim* that is being relied upon by Encik Awang Armadajaya, the learned DPP, in support of his preliminary objection,

A although not a dissenting, is only a minority judgment. The learned judge had ruled that the Federal Court has no inherent power to review its own previous decision. In the words of the learned judge (at p 447):

> [88] It is clear that this court has not been conferred any statutory right to review its
B own decision. It is also clear that this court has no inherent power to review its own decision. The decision of this court on 29 January 2010 was final. The interpretation both on facts and law in that decision, whether it was correct or otherwise, are matters of opinion of that panel of this court. It cannot subsequently be reviewed, reheard, reopened or relitigated before another panel of this court.

C

[117] Encik Awang Armadajaya contends that this judgment of Mohd Ghazali Yusoff FCJ is authority for the proposition that the Federal Court has no power or jurisdiction to review its own previous decision under any
D circumstances whatsoever. The learned DPP then argues that if the Federal Court does not have the inherent powers to review its own decision, in spite of the fact that there is r 137 of the Rules of the Federal Court 1995, a fortiori, the Court of Appeal too does not have the power to review its own previous decision. The Rules of the Court of Appeal 1994 does not have a provision
E similar to r 137 of the Rules of the Federal Court, but the Rules of the Court of Appeal have rule 4 which empowers the Court of Appeal to apply the procedure and practice in the Rules of the High Court 1980, and in the context of the issue at hand O 92 r 4 of the Rules of the High Court is significant.

F **[118]** With respect, in considering the argument of Encik Awang Armadajaya, it is of importance for me to stress here that the view of Mohd Ghazali Yusoff FCJ is not shared by the other two members of the panel, namely, Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ. Both Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ, in their judgments, take the
G contrary position. They take the position that the Federal Court has the inherent powers or jurisdiction in exceptional circumstances to review its own previous decision where it is necessary to do so in order to prevent an injustice being occasioned or in order to prevent an abuse of the court process. Zulkefli Makinudin FCJ, in his judgment, said (at p 405):

H

> [2] I am of the view r 137 cannot be construed as conferring upon the Federal Court the statutory jurisdiction or the new jurisdiction to hear any application to review its own decision. However, under r 137 the Federal Court still has the limited 'inherent power' or 'inherent jurisdiction' in order to maintain its character as a court of
I justice to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the court. There is an important difference between the nature of the inherent jurisdiction of the court and its statutory jurisdiction. The source of the statutory jurisdiction of the court is the statute itself which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law and that

the limits of such jurisdiction are not easy to define (see Sir Jack Jacob QC *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems 23).

[119] And Heliliah Mohd Yusof FCJ in her judgment said (at p 488):

> [148] The rule itself is being framed as a deeming provision. The words '… nothing shall be deemed to limit or affect' means also nothing in the rules shall be regarded as limiting or affecting the inherent powers of the court. The 'court' of course is a reference to the Federal Court. The SG seems troubled by the source of the power. Is the deeming provision a legal fiction or statutory hypothesis. The term 'inherent powers' refers to the judicial powers of the Federal Court itself. 'Inherent' means it is intrinsic or organic to the judicial powers of the Federal Court and hence being so the Federal Court draws upon it in the limited circumstances prescribed in r 137 namely to address injustice or abuse of processes. A certain reserve of powers intrinsically remains with the court for the simple reason that the Federal Court is created by the constitution as a judicial organ at the apex of the judiciary. Hence by virtue of being at the apex it is only the Federal Court (and no other non judicial branch) that has to be the organ to deal with 'injustice' or 'abuse of processes'. It is in that limited sense that the jurisdiction itself stems from the inherent powers, for the powers being intrinsic and organic to the judicial powers of the Federal Court, those powers may therefore be drawn upon as and when circumstances require. It therefore constitutes a separate exercise and more of a rectifying process. The exercise of that inherent power will only be triggered by an application made to it, upon which the court could said to become seised of it. In that sense it could be said to exercise an inherent jurisdiction.

[120] It hardly needs stating here that I am bound by the majority judgment in *Dato' Seri Anwar Ibrahim* rather than by the minority judgment of Mohd Ghazali Yusoff FCJ.

[121] The learned DPP, Encik Awang Armadajaya, also submits that the prosecution had raised a similar preliminary objection in two other cases recently, where an application for a review of a previous decision by the accused person was made, the first case being an application before the Court of Appeal and the other before the Federal Court. The Court of Appeal case is that of *Azlan bin Alias v Public Prosecutor* [2009] 4 MLJ 493, Court of Appeal Criminal Application No D-05–22 of 2004, whilst the Federal Court case is that of *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725, Federal Court Criminal Application No 05–84 of 2009(J). According to the learned DPP, in these two cases the preliminary objection of the prosecution was upheld by the court. But according to Encik Awang Armadajaya, hitherto, there has been no written judgment issued in respect of any of the two cases. With respect, since there have been no written judgments, I am unable to accord any judicial significance to these two cases cited by the learned DPP.

[122] I must also add that the majority judgment in *Dato' Seri Anwar Ibrahim* is consistent with a long line of precedents, namely, the following Federal Court judgments:

(a) *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1;

(b) *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385;

(c) *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673;

(d) *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517;

(e) *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & another application* [2005] 3 MLJ 1;

(f) *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417;

(g) *Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101;

(h) *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201;

(i) *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] MLJU 251; [2008] 6 CLJ 1; and

(j) *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833.

[123] In *Asean Security Paper Mills* Abdul Hamid Mohamad CJ gave five examples of situations in which the court may exercise its power of review. But it is important to note that His Lordship also said:

> Of course, there may be other circumstances.

[124] In some of the cases cited above, the Federal Court, having ruled that it had the inherent power to review a previous decision of the court in exceptional circumstances to prevent injustice and to prevent an abuse of the process of the court, nonetheless, having considered the facts of the particular application before it, proceeded to rule that the application had no merit and accordingly dismissed the application. But the judgments made it clear that the issue as to whether the Federal Court has the inherent power to review its own previous decision and the issue as to whether on the particular facts before it, the Federal Court ought to exercise its power of review in favour of the applicant are two separate issues. Needless to say, these two questions must be dealt with and considered separately in order to avoid any confusion.

[125] In *Asean Security Paper Mills* Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA took pains to explain that the inherent powers of the Federal Court to review its own previous decisions are not derived from r 137 of the Rules of the Federal Court.

[126] In addition there is the Federal Court of India case of *Raja Prithwi Chand Lal Choudhury v Sukraj Rai and others* AIR 1941 FC 1 which ruled:

> The Federal Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. The rules which govern the practice of the judicial committee and of the House of Lords in matters of review govern the practice of the Federal Court as well in India. Consequently no case in the Federal Court can be reheard and an order once made is final and cannot be altered. Nevertheless, in exceptional circumstances, an application for review can be entertained. The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by misprision in embodying the judgments, or have been introduced through inadvertence in the details of the judgment. It can also supply manifest defects in order to enable the decrees to be enforced, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremedial injustice being done by a court of last resort as where by some accident, without any blame, the party has not been heard. But in no case however can a re-hearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the court: (1886) 11 App Cas 660; (1836) 1 Moo PCC 117; (1871) LR 3 PC 664 and 14 Mad 439 (PC), Rel on.

[127] The above judgment of the Federal Court of India has been cited with approval by our Federal Court in *Chu Tak Fai*.

[128] In conclusion, based on local and foreign authorities, I am of the view that the Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort. The minority judgment of Mohd Ghazali Yusoff FCJ in *Dato' Seri Anwar Ibrahim* is, with respect, against clear, abundant and established judicial precedents. And I wish to add that the source of these inherent powers, as explained by Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA in *Asean Security Paper Mills*, and by James Foong JCA in *Abdullah bin Idris*, is neither r 137 of the Rules of the Federal Court nor r 4 of the Rules of the Court of Appeal read with O 92 r 4 of the Rules of the High Court. As correctly explained by the Chief Justice of the Federal Court and the President of the Court of Appeal in *Asean Security Paper Mills*, r 137

merely confirms or recognises the existence of the inherent powers of the Federal Court: the rule does not create or confer the inherent powers; it merely serves as a reminder of the existence of inherent powers that are already there in the first place. The source of the inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art 121. These inherent powers are powers that the courts must have in order to dispense justice effectively and the limits of these inherent powers, as noted by Zulkefli Makinudin FCJ in *Dato' Seri Anwar Ibrahim*, are difficult to define and, indeed, I venture to say that the limits of these inherent powers can never ever be precisely determined either by the courts or by Parliament. And in this regard I must reject the suggestion by the learned DPP that art 121 of the Federal Constitution read with s 50 of the Courts of Judicature Act limits the inherent powers of the Federal Court and the Court of Appeal, or that the art 121 read with s 50 does not confer any inherent powers on the courts to review their previous decisions. Indeed, it is clear to me that neither art 121 nor s 50 diminishes the inherent powers either of the Federal Court or of the Court of Appeal. Article 121 confers the judicial power on the courts, and the Courts in exercising that judicial power must of necessity have the inherent powers so that justice could be mete out effectively and in a meaningful manner.

[129] Accordingly, I am dismissing the deputy public prosecutor's preliminary objection, and I shall now invite Encik Karpal Singh to submit on the merits of the respondent's application (preliminary objection dismissed; hearing to proceed on the substantive application).

Preliminary objection allowed.

Reported by Kanesh Sundrum